United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7083

To be argued by:
MARTIN TEICHER

United States Court of Appeals

For the Second Circuit

Docket No. 75-7083

JAMES W. HERENDEEN,

Plaintiff-Appellant,

—against—

CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE PAPERS INCORPORATED, and CHEMICAL BANK NEW YORK TRUST COMPANY; THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN
Attorneys for Defendants-Appellees
1345 Avenue of the Americas
New York, New York 10019
Tel: (212) 765-6000

SEYMOUR SHAINSWIT
MARTIN TEICHER
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

United States Court of Appeals

For the Second Circuit

Docket No. 75-7083

JAMES W. HERENDEEN,

Plaintiff-Appellant,

—against—

CHAMPION INTERNATIONAL CORPORATION; NATIONWIDE PAPERS INCORPORATED; and CHEMICAL BANK NEW YORK TRUST COMPANY; THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANTS-APPELLEES' BRIEF

Preliminary Statement

Plaintiff, James W. Herendeen ("Herendeen"), is appealing from a Judgment of the United States District Court for the Southern District of New York which dismissed his amended complaint pursuant to Rule 12(b)(6)

of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted (132a*).

Herendeen is a former employee of defendant Nationwide Papers Incorporated ("Nationwide"),** who voluntarily resigned his position as a paper salesman on or about May 15, 1969 and took new employment as a paper salesman for a competitor of Nationwide (12a). In this diversity action, Herendeen charges that pursuant to a conspiracy to drive him from the paper industry and misappropriate his pension funds, the defendants effected the wrongful cancellation of Herendeen's benefits under the employee retirement plan in which he had participated prior to his resignation (92a-94a). The relief sought ranges from compensatory damages in the amount of $100,000 to rescission of the termination of Herendeen's retirement benefits and injunctive relief enforcing said benefits, to reimbursement of Herendeen's counsel fees and other expenses, to a total of $785,000 in punitive damages in varying amounts from the several defendants (96a-98a).

This extraordinary and far-reaching demand for relief is unsupported by any pleaded factual basis, a fatal defect which Herendeen failed to cure even in his answering affidavits opposing defendants' motions to dismiss. On December 30, 1974, the District Court dismissed Herendeen's amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted (128a-131a). A Judgment of dismissal was filed on January 21, 1975 (132a).

---

* Numbers in parethesis refer to pages in the Joint Appendix.

** Nationwide ceased to exist on or about January 1, 1970. Its business is presently a division of defendant Champion International Corporation, which is successor in interest to Nationwide (45a).

Issue Presented

Since the dismissal of Herendeen's action was ordered pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this appeal presents but one issue: whether on the record before the District Court, Herendeen succeeded in stating any claim upon which relief can be granted.

Statement of the Case

Background of this Lawsuit

As we noted at the outset, Herendeen is a former paper salesman for Nationwide who voluntarily resigned on May 15, 1969. This action is but Herendeen's latest foray into litigation against the defendants, his former employers, and any of their subsidiaries, officers, employees and associates that Herendeen can entrap by the broad sweep of his accusations. And the amended complaint whose dismissal is before this Court is but the latest revised version of this imagined grievance, which has been dismissed once in the state court and twice in the federal District Court. Despite repeated and bewildering shifts in theory, Herendeen has been unable to reduce his conclusory and sometimes unbelievable allegations to any legally cognizable claim for relief in any court, state or federal.

Herendeen's crusade began in the Supreme Court of the State of New York, County of New York, where he commenced a lawsuit not only against Champion International Corporation ("Champion") and Nationwide, but also against several of their officers and employees, including Champion's Chairman of the Board, claiming that he had been the victim of a conspiracy whereby Champion and certain of its executives sought to drive Herendeen from the paper business and to deprive him of his pension and other benefits as a Champion employee (69a). Although he

claimed to have been promised an employment contract, in his state court complaint Herendeen was not even able to specify such basic terms of this alleged contract as the amount of salary he was to receive or the duration of his employment. For damages in the state court, Herendeen demanded $275,000—$200,000 of which was characterized as "commissions and earnings in the commercial paper business" and the remaining $75,000 as "the benefits of Pension and Health Plans of Champion" (65a-70a).

The state court action was dismissed by Mr. Justice Jacob Markowitz for failure to state a cause of action (71a), and a Judgment of dismissal was entered on June 12, 1973 (46a). The dismissal was affirmed unanimously by the Appellate Division, First Department on May 17, 1973 (41 App. Div. 2d 1030, 343 N.Y.S. 2d 785), and leave to appeal was denied by the New York Court of Appeals on July 3, 1973 (33 N.Y. 2d 514) (not otherwise reported).

Thereafter, nearly five years after the events in question took place, Herendeen changed forums to the United States District Court for the Southern District of New York. In the federal court, Herendeen filed a complaint which in its core grievance concerning pension benefits is virtually identical to his state court complaint. The only difference is that in the federal court Herendeen has excised all references to the alleged promise of an employment contract and has rested his entire case on the repetitive thesis that there was a conspiracy to drive him out of the paper business and deprive him of his pension benefits.

Despite semantic embellishments designed to bring in additional defendants and to present the federal complaint as a "new" cause of action, the court below was quick to recognize that the federal complaint is no stranger to litigation but is, rather, a duplicative rehash of part of the earlier

state grievance, whose dismissal the New York Court of Appeals declined to upset. The $75,000 in damages which Herendeen claimed in the state court as "the benefits of Pension and Health Plans of Champion" (70a) have here been ballooned to a total of $885,000 in compensatory and punitive damages, claimed to be due from the various defendants in the federal court (96a-98a).

Named as defendants, in addition to Champion and Nationwide, are Chemical Bank New York Trust Company ("Chemical Bank") and Fifth Third Bank of Cincinnati, Ohio ("Fifth Third Bank"), who are trustees of the funds contributed to the plan. The fifth defendant is the Committee, Retirement Plan for Salaried Employees of Certain Subsidiaries of Champion International Corporation ("Comittee"), a body of Champion employees appointed under the Plan to take charge of its administration.

The Plan

In the federal court, Herendeen seeks to enforce his alleged rights under the Retirement Income Plan for Salaried Employees of Certain Subsidiaries of U.S. Plywood-Champion Papers, Inc. (hereinafter referred to as the "Plan" or the "Retirement Income Plan"). A true and complete copy of the Plan is contained in the Record on Appeal as Exhibit C to Defendant's Notice of Motion to dismiss the amended complaint (Document No. 16 in the Index to the Record on Appeal). All relevant pages of the Plan are reproduced in the Joint Appendix at pp. 73a-81a.

The Plan provides for the payment of benefits to eligible retired employees of companies participating in the Plan from funds placed by the companies in trust with trustees. Eligible employees may, if they wish, elect to make con-

tributions to the Plan as well, thereby increasing the benefits they may receive upon retirement (Retirment Income Plan, §§ 4 and 7). If an employee has made voluntary contributions but is ineligible to receive benefits upon retirement, the amount of his contributions is returned to him with interest (Retirement Income Plan, § 15.8 (81a).

The Plan is administered by defendant, the Committee. Under the Plan, the Committee is authorized to determine any questions arising in the administration, interpretation and application of the Plan, including the eligibility of retired employees to receive benefits under the Plan (Retirement Income Plan, § 12.1) (76a-77a).

The funds contributed by employees and by participating companies constitute under the Plan a "Trust Fund," which is held by the trustees appointed pursuant to section 13 of the Plan (77a-78a). Defendants Chemical Bank and Fifth Third Bank are the trustees appointed pursuant to section 13 of the Plan. They have no discretion and make no determinations as to the eligibility of individual employees to receive benefits under the Plan, but are merely a depository for the Trust Fund, receiving and holding deposits made by the companies and by employees and disbursing funds at the direction of the Committee, which has sole authority to administer the Plan.

Section 15.1 of the Plan provides that the establishment of the Plan gives no legal or equitable right to any person against any company participating in the Plan (Retirement Income Plan, § 15.1) (79a), and section 13.2 of the Plan provides that no participating company shall have any liability or responsibility under the Plan other than to make contributions to the Trust Fund (Retirement Income Plan, § 13.2) (78a). The Plan also provides that, except for gross negligence or fraud, no liability shall be incurred by

any stockholders, officers or members of the board of a company, subsidiary or affiliate, the Committee or any representatives appointed under the Plan (Retirement Income Plan, § 15.7) (80a).

Section 15.8 of the Plan states several conditions and presents several alternatives affecting the right of an employee to receive retirement benefits if he leaves the employ of a participating company and accepts employment with a firm selling products similar to those sold by the participating company which formerly employed him.

If the employee's new employment does not require or involve the disclosure or use of knowledge or information gained in the course of his prior employment with a participating company, the employee continues to be eligible to receive his retirement benefits. If the Committee, however, determines that his new employment does require or involve the disclosure or use of such knowledge or information, the employee will not be eligible for benefits unless he establishes to the reasonable satisfaction of the Committee that his new employment does not require or involve the disclosure or use of such knowledge or information. The burden of proof under section 15.8 is expressly placed upon the employee. The employee may, of course, instead choose to receive the payment, with interest, of all the contributions he has made to the Plan (Retirement Income Plan, §§ 15.8 and 18.3) (80a-81a).

The Original Complaint

Shortly after Herendeen resigned his position with Nationwide, the Committee determined that his new employment with Ris Paper Co. ("Ris") requires or involves the disclosure or use of knowledge or information gained in the course of his employment with Nationwide. Accord-

ingly, the Committee sent Herendeen notice pursuant to section 15.8 of the Plan that his benefits would be terminated unless he either ceased his employment with Ris or met his burden under the Plan of establishing to the Committee's reasonable satisfaction that his new employment did not require or involve the disclosure or use of knowledge or information gained in the course of his employment with Nationwide (102a-103a). When, after nine months of correspondence back and forth, it was clear that Herendeen was unable to meet his burden under section 15.8 of the Plan, the Committee terminated Herendeen's benefits under the Plan and sent him a check covering his contributions to the Plan, plus interest. Herendeen refused to accept the check and returned it uncashed to the Committee (51a-52a).

In his original complaint in the federal court (27a-39a), Herendeen charged that his benefits under the Plan had been wrongfully terminated by means of an alleged scheme in which the various defendants, for reasons unclear from the pleadings, have participated. Conspiracy and breach of fiduciary obligations were charged without any factual basis. The defendants were alleged to have acted in concert to force Herendeen out of the paper business, to terminate his pension rights and to wrongfully withhold or misappropriate funds allegedly belonging to or set aside for Herendeen. How and when defendants sought to drive Herendeen from the paper business was not specified, nor was the motive for doing so stated. This factual gap is especially noteworthy in view of Herendeen's inconsistent admission in the complaint that he resigned—voluntarily—his position with Nationwide (30a).

A further argument was suggested in the original complaint to the effect that Herendeen was discriminated

against in that other employees who left Champion were not similarly deprived of their benefits (33a). Yet no specifics of this alleged discrimination were offered. The original complaint did not even contain a *pro forma* allegation to the effect that these unspecified employees were similarly situated, much less as to their identities, the nature of their employment with Champion and with their new employers and whether said new employment involves or requires the disclosure or use of knowledge or information gained in the course of their employment by Champion.

The Amended Complaint

On July 12, 1974, defendants moved to dismiss the original complaint or, in the alternative, for a more definite statement thereof (1a-26a). The substantive basis for the motion to dismiss was twofold: (a) specific provisions of the Plan itself bar any recovery by Herendeen from any of the defendants, and (b) punitive damages are not available as a matter of law by reason of the facts set forth in the complaint. The alternative motion for a more definite statement pointed out that from the pleading it was impossible to determine what the factual basis was for Herendeen's charges of fraud, conspiracy and discriminatory treatment. On the motion for a more definite statement, we also noted that a fleshing out of the federal pleading might raise *res judicata* as an absolute bar to this proceeding (25a).

On July 18, 1974, the District Court entered a Memorandum Endorsement, granting defendants' motion for a more definite statement and directing Herendeen to serve and file an amended complaint

> "correcting the defects complained of and alleging the details desired by the defendants" (82a).

The District Court denied defendants' motion to dismiss with leave to renew following service of an amended complaint.

The amended complaint (83a-98a) is a virtual carbon copy of Herendeen's original complaint. Like the original complaint, it levels charges of fraud and conspiracy, without setting forth an iota of factual support for any of them. Like the original complaint, it balloons damages, which in the state court Herendeen had claimed to be $75,000 for loss of his pension rights, to a total of $885,000 in compensatory and punitive damages. But most significant of all, like the original complaint, the amended complaint fails to overcome the threshold obstacle which was the basis of defendants' original motion to dismiss: Herendeen's claims for damages are barred by specific provisions of the very Plan whose provisions he seeks to enforce.

Only in one respect does the amended complaint differ from Herendeen's original pleading. Although the bewildering array of lurid but unsupported theories has by no means been eliminated. Herendeen purports to identify the other employees involved in his nebulous discrimination claim. In paragraphs 20 through 24 of the amended complaint (87a-88a), Herendeen has specified five employees whose pension rights were not terminated by the Committee when they left Champion's employ.

Rather than add substance to a factually deficient pleading, however, these specifics reveal that Herendeen's claim of discrimination is entirely fabricated and without factual basis. Incontrovertible fact, which Herendeen did not disputed in his answering affidavit, demonstrates that each of the five former employees specified in the amended complaint was in an entirely different situation vis-a-vis Champion from that of Herendeen. The different treat-

ment afforded these five enumerated employees was consistent with their different situations and, therefore, resulted not from invidious discrimination but from the consistent application of rational and uniform rules to all participants in the Plan (54a-59a).

Summary of Argument

In the court below, we urged that three fundamental defects required dismissal of the amended complaint, and we keyed our notice of motion to these defects (40a-43a). In his memorandum decision, Judge MacMahon rested his dismissal of the amended complaint on the doctrine of *res judicata* (128a-131a), a doctrine which we had suggested in our original motion might provide the basis for a shorthand disposition of this lawsuit (25a).

We respectfully submit that the dismissal of this action for failure to state a claim upon which relief can be granted must be affirmed.

In Point I of this brief, we will demonstrate that the first and second Counts of the amended complaint fail to state a claim upon which relief can be granted on the ground that the Plan itself bars Herendeen from seeking compensatory or punitive damages from any of the defendants by reason of the enforcement of section 15.8.

In Point II of this brief, we will demonstrate that the first and second Counts of the amended complaint fail to state a claim upon which relief can be granted in that Herendeen's claim of discrimination is without any legal or factual oasis.

In Point III of this brief, we will demonstrate that the conclusion of the court below that this action is barred by the doctrine of *res judicata* is unassailable.

In Point IV of this brief, we will demonstrate that the second Count of the amended complaint fails to state a claim upon which relief can be granted on the additional, independently conclusive ground that, as a matter of law, punitive damages are not available to Herendeen from any of the defendants.

ARGUMENT

POINT I

The Plan is a valid and enforceable contract barring any recovery by Herendeen from any of the defendants by reason of the enforcement of section 15.8.

Under Ohio law,* as under New York law, pension or profit sharing plans are binding contracts, and an employee's rights under such plans are contract rights. *Vocke* v. *Third Nat. Bank & Trust Co.*, 28 Ohio Misc. 58, 267 N.E.2d 606 (Mun. Ct. 1971). In seeking to enjoy the promised benefits of such a plan, an employee cannot ignore the other terms, conditions and restrictions of the contract. Thus, in the leading case of *Gitelson* v. *DuPont*, 17 N.Y.2d 46, 268 N.Y.S.2d 11 (1966), the New York Court of Appeals, reversing a judgment for plaintiff-employee which had been affirmed by the Appellate Division, held:

> "The rights of the plaintiff under the plan are contract rights and are limited by the provisions of the contract.
>
> ". . . [A]n employee's right to receive payment under the plan is a conditional contract right and when plaintiff became a party to the contract by

* Section 15.3 of the Plan provides that the Plan is to be "governed, construed and administered in accordance with the laws of the State of Ohio" (79a).

> taking employment under it he was bound by these conditions" (17 N.Y.2d at 48-49, 268 N.Y.S.2d at 13).

Similarly, in *Menke* v. *Thompson*, 140 F.2d 786 (8th Cir. 1944), the court held:

> "The liability of the railroad company was fixed by the terms of the rules and regulations governing the pension plan" (140 F.2d at 790).

In our case, Herendeen has placed himself in the untenable position of seeking to affirm claimed rights under the Plan while at the same time ignoring the express provisions of the Plan barring the very relief he seeks in this lawsuit.

Key provisions of the Plan expressly bar Herendeen from maintaining this suit.

As to Champion and Nationwide. Sections 13.2 and 15.1 of the Plan expressly bar Herendeen's claims against Champion and its dissolved subsidiary, Nationwide. Section 13.2 of the Plan provides:

> "[N]o Company, Subsidiary or Affiliate shall have any liability or responsibility other than to make contributions to the Trust Fund as herein provided" (78a).

Section 15.1 of the Plan provides:

> "The establishment of the Plan, or of any fund, or any insurance contract thereunder, or any modifications thereof, or the payment of any benefit hereunder, shall not be construed as giving any person whomsoever any legal or equitable right against a Company, Subsidiary, or Affiliate, or its officers, directors or shareholders, or as giving any person

> the right to be retained in the service of a Company, Subsidiary or Affiliate" (79a).

Such provisions barring suit between parties to a contract are, of course, enforceable in accordance with their terms under well-settled principles of contract law. Thus, it has been noted:

> "A contract by which one person promises never to sue the other party or a third person for the enforcement of a specific right, or not to do so for a limited time, bars an action for that purpose . . ." Restatement, *Contracts* § 405(1).

Since the express provisions of the Plan bar any liability on the part of or recovery from Champion and Nationwide by reason of the Plan, the first and second Counts of the amended complaint fail to state a claim against said defendants upon which relief can be granted.

As to Chemical Bank and Fifth Third Bank. By the very nature of their functions under the Plan, Chemical Bank and Fifth Third Bank can have no present liability to Herendeen. Section 2.1(h) of the Plan contains the following definition:

> " 'Trustee' means one or more corporations, persons, banks, or trust companies, or combination thereof, designated by the Companies to hold the Trust Fund" (74a).

Section 12.1 of the Plan provides:

> "The Plan shall be administered by the Committee, which shall have such powers as may be delegated to it by the Presidents of the Companies, under rules uniformly and consistently applicable to all Participants under similar circumstances.
>
> * * *

> "The Committee will certify, as necessary, the persons entitled to payments, and the amounts that are to be paid to each of them out of the Trust Fund, and will exercise the authority and carry out the duties set forth in the trust agreement. . . .[T]he Committee may determine any questions arising in the administration, interpretation and application of the Plan and trust agreement, including but without limitation, the eligibility and date of eligibility of Employees, rights to participate, the amount by which any payment to be made hereunder should be reduced or increased, the age of an Employee or any other person, the earnings of any Employee, the date of termination of employment, and the number of months or years of Continuous Service to be used in determining the amount of retirement income to be paid. A determination by the Committee, within the scope of its authority, shall be conclusive and binding on all persons concerned" (76a-77a).

Since administration of the Plan is placed solely in the hands of the Committee, the trustees cannot have been a part of the alleged scheme of which Herendeen complains. They have no discretion in the determination of who is eligible for benefits, the amount of such benefits or any other question relating to the administration of the Plan. Their function is purely ministerial: the trustees receive and hold such monies as the companies and employees contribute and disburse them at the direction of the Committee. Moreover, since Herendeen does not claim to be entitled to actual payment of any benefits under the Plan, his purported claim against the trustees is purely hypothetical and premature, since the trustees cannot as yet have failed to disburse to Herendeen any funds allegedly due to him.

Accordingly, since there is no present claim which Herendeen can have against the trustees, the first and

second Counts of the amended complaint fail to state a claim against Chemical Bank and Fifth Third Bank upon which relief can be granted.

As to the Committee. As in the case of Champion and Nationwide, express provisions of the Plan bar Herendeen's claims against the Committee. Section 15.7 of the Plan provides:

> "It is declared to be the express purpose and intention of the Plan that no liability whatever shall attach to or be incurred by the stockholders, officers or members of the Board of Directors of a Company, Subsidiary or Affiliate, the Committee or any representatives appointed hereunder, under or by reason of any of the terms or conditions of the Plan. No person shall be liable for any act or failure to act hereunder except for gross negligence or fraud" (80a).

"No liability whatever" can therefore attach to or be incurred by the Committee under the express provisions of the Plan. Since this provision will be enforced "according to its terms," *Gitelson* v. *DuPont*, 17 N.Y.2d at 48, 268 N.Y.S.2d at 13, Herendeen's attempt to recover compensatory and punitive damages from the Committee must fail. Accordingly, the first and second Counts of the amended complaint fail to state a claim against the Committee upon which relief can be granted.

Moreover, section 15.8 of the Plan is enforceable according to its terms.

Traditionally, restraints on competition contained in pension plans are looked upon more favorably than similar restraints contained in employment contracts. As the Fourth Circuit noted in *Rochester Corp.* v. *Rochester*, 450 F.2d 118 (1971):

> "The authorities . . . generally draw a clear and obvious distinction between restraints on competitive employment in employment contracts and in pension plans. The strong weight of authority holds that forfeitures for engaging in subsequent competitive employment, included in pension retirement plans, are valid, even though unrestricted in time or geography. The reasoning behind this conclusion is that forfeiture, unlike the restraint included in the employment contract, is not a prohibition on the employee's engaging in competitive work but is merely a denial of the right to participate in the retirement plan if he does so engage" (450 F.2d at 122-23) (footnotes omitted).

Section 15.8, of course, is part of a pension plan, not an employment contract. It is not a flat restraint on competition, since it in no way prevents Herendeen from working for a competitor of Champion. All the Plan requires is that if Herendeen does choose to work for a competitor, he may not disclose or use knowledge or information gained in the course of his employment with Champion. Moreover, and of controlling significance, the only sanction for violation of this restriction is the loss of pension rights. Under Ohio law and under recent decisions by this Court, such a condition is enforceable.

GTI Corp. v. *Calhoun*, 309 F.Supp. 762 (S.D. Ohio 1969), is the only Ohio authority in point. In that case, the employer sought injunctive relief under an anti-competition clause contained in an employment contract to restrain the defendants from using certain claimed trade secrets The anti-competition clause sought to be enforced in *Calhoun* required the defendants to disclose and assign to GTI all inventions, discoveries and improvements de-

veloped both during their employment and during a period of five years after termination of their employment. In striking down this harsh restraint, the court noted that a more limited restraint such as that in our case would be permissible. Practically paraphrasing section 15.8, the court held:

> "An employer is only entitled to restrain a former employee from disclosing and using confidential information which was developed as a result of the employer's initiative and investment and which the employee learned as a result of the employment relationship" (309 F.Supp. at 768).

Under *Calhoun*, therefore, a restraint similar to that contained in section 15.8 of the Plan would be enforceable even if contained in an employment contract, where the standards for enforceability are more stringent (*see*, *Rochester Corp.* v. *Rochester*, *supra* at pp. 16-17).

Two recent decisions by this Court accord with this result. Post-employment restrictions were sustained in *Bradford* v. *New York Times Co.*, 501 F.2d 51 (2d Cir. 1974), and in *USAchem, Inc.* v. *Goldstein*, 512 F.2d 163 (2d Cir. 1975).

In *Bradford*, the restriction was contained in an Incentive Compensation Plan which entitled the employee to receive in ten equal annual installments shares of New York Times Co. stock equal to the number of "retirement units" which the employee had accumulated during his tenure of employment with the company. As a condition to receiving his shares and participating in the plan, the employee had to execute and be bound by a separate agreement which obliged him not to "engage in any business or practice or become employed in any position in competition with The

Times or which is otherwise prejudicial to the interests of The Times, and that he will hold himself available to The Times for reasonable consultation and other services" (501 F.2d at 54).

Bradford had taken employment with a competitor of the Times, and as a result his rights under the Times' plan had been cancelled. Bradford brought suit in the District Court claiming, like Herendeen, that his benefits had been wrongfully terminated. Unlike Herendeen, Bradford bottomed his claim on the contention that the non-competition clause was an unreasonable restraint of trade or commerce both under New York law and under the Sherman Act.

After reviewing applicable New York law on the reasonableness of anti-competition restraints, this Court affirmed the District Court's dismissal of the complaint, sustaining the anti-competition clause contained in the Times' plan as applied to Bradford. The Court held:

> "Bradford's resignation did not terminate his employer's obligations. He was to receive annual installments of stock for a ten-year period so long as he abided by his promise not to compete. There was a continuing consideration being paid for his loyalty and good will. While this was a restraint upon his liberty, it can hardly be described as unreasonable. Had he persevered, his reward would have been great indeed. In the employee restraint cases we have considered, breach led either to injunctive relief, in which case of course the employee was prevented from going elsewhere and at the same time received no new or continuing consideration from his former employer, or to the forfeiture of an amount posted by the employee or a judgment against him for the sum fixed as liquidated damages. Here,

> Bradford paid nothing but merely disabled himself from collecting the continuing payments made by the Times. We think, therefore, that the case has an element not present in the prior employee cases in which there was no consideration for the post-employment covenant against competition, and that this factor cannot be overlooked in determining the reasonableness of the restraint presented here.
>
> * * *
>
> "We see no other elements of unreasonableness in the agreement. The time fixed, ten years, is commensurate with the payment of benefits. There is no geographical limitation set forth, but, by the terms of his agreement, Bradford is only precluded from competition which is detrimental to the Times, which is no greater than that to which the paper is entitled" (501 F.2d at 58-59).

In *Goldstein*, the restriction was contained in a sales representation agreement, which was in effect an employment contract. The restriction prohibited Goldstein during his term of employment and for eighteen months thereafter from selling products comparable to those covered by the agreement on his own behalf or on behalf of others in his assigned territory or from soliciting or diverting his employer's customers. This Court confirmed the validity of the anti-competition clause to the extent that it precluded Goldstein from soliciting former customers with whom he had done business in his assigned territory. Moreover, the Court also affirmed dismissal of Goldstein's counterclaim based on forfeiture of Goldstein's interest in a profit-sharing plan because of his violation of the anti-competition clause. The Court held that such a forfeiture constituted a valid liquidated damages clause:

"We do not believe that the court below erred in dismissing defendant's counterclaim against Chem which was based upon its alleged conversion of Goldstein's interest in the employee's profit-sharing plan, which, after nine years' employment, vested him with 45% of his Individual Account (45% of $6,560). Section 12.3 of the plan provided for a forfeiture of all amounts remaining in his account if he competed directly or indirectly with his employer. There is no doubt that Goldstein did solicit customers in violation of the covenant and that, under such an agreement, the forfeiture constitutes a valid liquidated damages clause which is enforceable. Bradford v. New York Times Co., *supra*, 501 F.2d at 57" (512 F.2d at 169).

Section 15.8 of our Plan clearly passes muster under *Bradford* and *Goldstein*. Champion's obligations under the Plan constitute a continuing consideration for Herendeen's loyalty. The restraint on Herendeen's liberty can hardly be termed unreasonable in view of the fact that the only stricture for violation of section 15.8 is cancellation of the pension. No injunctive relief is permitted, and Herendeen is in no way disabled from engaging in competitive employment. Indeed, the Plan does not even envision a forfeiture or liquidated damages, since upon cancellation of the pension the Plan requires repayment to the employee of all his voluntary contributions, plus interest (Retirement Income Plan, §§ 15.8 and 18.3) (80a-81a).

Finally, we should make note of the new Federal Employee Retirment Income Security Act of 1974 ("ERISA"), which amended the Internal Revenue Code of 1954. Although the Employee Retirement Income Security Act requires elimination from qualified plans of nearly

all divestiture provisions, including non-competition clauses (ERISA § 203(a)), the new federal statute has no retroactive application and would therefore have no effect on the rights of an employee, like Herendeen, whose pension rights were terminated more than five years prior to enactment of the new legislation (ERISA § 1017; *see also*, Conference Committee Report, August 12, 1974, at p. 266). As to the controlling decisional law, *i.e.*, the law prior to the enactment of the new legislation, section 15.8 is clearly valid and enforceable both under accepted case law, *Bradford* v. *New York Times Co.*, 501 F.2d 51 (2d Cir. 1974); *USAchem, Inc.* v. *Goldstein*, 512 F.2d 163 (2d Cir. 1975); *Rochester Corp.* v. *Rochester*, 450 F.2d 118 (4th Cir. 1971); *Gitelson* v. *DuPont*, 17 N.Y.2d 46, 268 N.Y.S.2d 11 (1966); *Menke* v. *Thompson*, 140 F.2d 786 (8th Cir. 1944); *GTI Corp.* v. *Calhoun*, 309 F. Supp. 762 (S.D. Ohio 1969), and under Internal Revenue policy, "Guides for Qualification for Pension, Profit-Sharing and Stock Bonus Plans," [I.R.S. Pub. 778 (2-72) at Part 5(c)(3)].

Conclusion

Since Herendeen's claims against the defendants are barred by explicit provisions of the Plan, which are valid and enforceable, the court below was correct in dismissing the amended complaint for failure to state a claim upon which relief can be granted.

POINT II

Herendeen's claim of discrimination is without any legal or factual basis.

As a legal concept, discrimination was given its classic formulation by Mr. Justice Jackson in his opinion for the U.S. Supreme Court in *Walters* v. *City of St. Louis*, 347

U.S. 231 (1954). Referring to the equal protection clause of the Constitution, the Court held:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, as to be wholly arbitrary" (347 U.S. at 237).

" 'Discrimination' is a term well undrestood in the law," one court has recently noted. "It is in general a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored." *Baker* v. *California Land Title Co.*, 349 F.Supp. 235, 238 (C.D. Cal. 1972), *aff'd*, 507 F.2d 895 (9th Cir. 1974). Essential to a claim of discrimination is a showing by plaintiff that there has been a lack of good faith or arbitrariness. *Hilson* v. *Sun Life Assur. Co. of Canada*, 132 F.2d 989, 990 (5th Cir. 1943).

In our case, therefore, in order to state a claim for discrimination, Herendeen must show that there is no real difference between himself and the other Champion employees specified in his amended complaint upon which a rational classification with respect to the enforcement of section 15.8 may be based. Alternatively, if a rational classification can be made, Herendeen must show either that the distinction is irrelevant to the classification or that the different treatment afforded him was so disparate, relative to the difference in classification, as to be wholly arbitrary. *Walters* v. *City of St. Louis*, 347 U.S. at 237. It is simply not sufficient for Herendeen to allege that he has been treated differently from others.

In our case, all Herendeen alleges is that he has been treated differently from five other former employees of

Champion (87a-88a). No facts are alleged which would show that there was no real difference between himself and the other employees upon which a rational classification could be based. Nor does Herendeen allege facts which would show that the different treatment is irrelevant to the classification between himself and the other employees or that he has been the victim of arbitrary action or bad faith. In short, measured by applicable legal standards, the amended complaint fails to set forth a claim for discrimination upon which relief can be granted.

Herendeen's inability to set forth a legally sufficient claim is no mere technical deficiency in pleading, however.

The Committee has followed a uniform practice of not enforcing the anti-competition strictures of section 15.8 of the Plan against any Champion employee whose departure from Champion is considered involuntary. Involuntary departure can come about, for example, where the employee reaches the company-wide mandatory retirement age of sixty five or where the division in which the employee has worked is sold. On the other hand, where an employee's departure is considered voluntary, as in the case of Mr. Herendeen, who voluntarily resigned on May 15, 1969, the Committee's practice has been to enforce section 15.8 (55a-56a).

Uncontroverted evidence demonstrates that each of the five employees specified in paragraphs 20 through 24 of the amended complaint (87a-88a) as the factual basis for Herendeen's discrimination claim left Champion's employ under circumstances which were clearly involuntary. Consistent with the rules uniformly applied in such cases by the Committee, section 15.8 was not invoked against these five employees. The undisputed facts surrounding the departures of these five employees, and which made section

15.8 inapplicable, are set forth in the affidavit of Jean Lucas, Champion's Assistant Secretary, submitted in support of defendants' motion to dismiss the amended complaint and are found at pp. 56a through 59a of the Joint Appendix.

Prior to December 31, 1967, Nationwide's business consisted of two segments, a commercial printing paper business and a book publishing products business. As of December 31, 1967, Nationwide sold its entire commercial printing paper business to Reinhold-Gould, Inc. ("Gould"), retaining for itself only the book publishing products business (a true and complete copy of the contract of sale between Gould and Nationwide was submitted below as an exhibit to the Lucas affidavit and is reproduced in full at pp. 106a through 113a of the Joint Appendix). Pursuant to paragraphs 2 and 3 of the contract with Gould, Nationwide expressly retained four key employees, including Herendeen, who were the backbone of the book publishing products business. With respect to its remaining employees, Nationwide agreed to "give its best efforts to assure that all personnel involved in the commercial printing paper segment . . . shall remain with the commercial printing paper business purchased by Reinhold-Gould" (106a).

All five of the employees specified in the amended complaint were employed in Nationwide's commercial printing paper segment. After sale of that business to Gould, four of the employees, i.e. Benjamin F. Brown, Joseph Carpitano, Austin B. McKnight and Louis Grabow became employees of Gould. Under these circumstances, the Committee determined that invoking section 15.8 against these four employees would have been inappropriate and, indeed, contrary to the underlying purpose of section 15.8.

Several considerations entered into this determination:

First, since Nationwide had sold the business in which they were employed, their departure was clearly involun-

tary, as their jobs no longer existed at Nationwide. In such circumstances, the Committee's consistent and long-standing policy has been not to invoke section 15.8.

Second, non-invocation of section 15.8 was supported by Nationwide's contractual obligation to use its best efforts to assure that all personnel involved in the commercial printing paper segment continue as employees of Gould. Since Herendeen was retained by Nationwide in its book publishing products business and since he was specifically excluded from the "best efforts" clause of the contract of sale (106a), his situation was the precise opposite of that of Messrs. Brown, Carpitano, McKnight and Grabow. Accordingly, the Committee's decision to invoke section 15.8 in Herendeen's case when he voluntarily resigned on May 15, 1969 was entirely consistent with its action in the other cases.

Third, the circumstances under which Messrs. Brown, Carpitano, McKnight and Grabow left Nationwide's employ made section 15.8 inapplicable by its own terms. Each of these employees was employed in the commercial printing paper business and left Nationwide for Gould in accordance with the contract of sale. As a result of the contract of sale, after December 31, 1967, Nationwide and Gould were no longer competitors in the commercial printing paper business, since Nationwide had given up this business entirely (58a).* Since Nationwide and Gould were not in competition in the business which had employed these four men, invoking section 15.8 would not have furthered the underlying purpose of the section, which is to discourage former employees from disclosing to competitors knowledge or information gained in the course of their employment with Nationwide.

* Indeed, under paragraph 12 of the contract of sale, Nationwide had licensed Gould to use Nationwide's trade names, trademarks and logos in the field (110a-111a).

Herendeen's case, on the other hand, was quite different. When he resigned on May 15, 1969, his new employer was in active competition with Nationwide. Action under section 15.8 was therefore entirely appropriate.

As to the fifth employee, C. William Arvidson, specified in paragraph 24 of the amended complaint (88a), Mr. Arvidson retired effective August 1, 1966, having reached the age of sixty-five. Since Champion has a company-wide mandatory retirement age of sixty-five applicable to all employees, Mr. Arvidson's departure was deemed involuntary and, in accordance with established rules uniformly enforced by the Committee, section 15.8 was not invoked against him (58a). Herendeen, on the other hand, resigned voluntarily, well before age sixty-five.

Each of the employees specified in the amended complaint was thus in an entirely different situation from Herendeen's. The classification of which Herendeen complains rests therefore on rational differences. Since the disparity in treatment is entirely consistent with the classification and with the legitimate purposes of section 15.8 of the Plan, Herendeen's claim to be the victim of discrimination is without substantive merit.

Even if the allegations of the amended complaint were technically sufficient to state a claim for discrimination—which they were not (*see* pp. 22-24, *supra*)—this Court has held that mere pleading proficiency will not defeat a motion for summary judgment.

> "[M]ere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment" *Engl* v. *Aetna Life Ins. Co.*, 139 F.2d 469, 473 (2d Cir. 1943).

> "Even though an issue of fact may be formally raised in the pleadings, affidavits may disclose that the issue is not genuine and permit summary disposition of the litigation" (*Hirsch* v. *Archer-Daniels-Midland Co.*, 258 F.2d 44, 47 (2d Cir. 1958).

The introduction by means of the Lucas affidavit of the factual refutation of Herendeen's discrimination claim placed Herendeen under "an obligation to disclose the substantive merits of [his] case." *Cook* v. *Hirschberg*, 258 F.2d 56, 58 (2d Cir. 1958). Herendeen has defaulted in meeting this obligation and has failed to disclose any substantive merit to his discrimiation claim, having failed in any way to controvert the facts introduced in the Lucas affidavit.

Accordingly, the facts regarding the five employees specified in the complaint being conceded, no genuine issue of fact exists on the discrimination issue. Absent a showing by Herendeen of bad faith, fraud or arbitrary action, the courts will not substitute their discretion for that of the Committee in a case like ours where the Plan provides that the Committee's determination is "conclusive and binding on all persons concerned" (77a). *Matthews* v. *Swift & Co.*, 465 F.2d 814, 819-821 (5th Cir. 1972). For this reason, the dismissal of the complaint for failure to state a claim upon which relief can be granted was entirely appropriate.

POINT III

The amended complaint is barred by *res judicata*.

The court below rested its decision on the ground of *res judicata*, holding that "the dismissal of [Herendeen's] state court complaint forecloses this action against all defendants" (130a). This conclusion is unassailable.

As we understand Herendeen's brief in this Court, it raises two objections to the application of *res judicata* in our case: (1) the absence of the necessary identity of issues, and (2) the absence of the necessary identity of parties.

Identity of Issues

The decision below is based upon "[a] comparative study of the state court complaint and the present amended complaint" (129a). This comparison, the District Court held, "shows that the claims asserted here are virtually identical to some of the claims contained in the state court complaint dismissed by Justice Markowitz for insufficiency" (129a).

This conclusion is borne out by the simple language of the two pleadings. In the state court complaint, Herendeen claimed $75,000 in damages based on his loss of "the benefits of Pension and Health Plans of Champion" (70a), which he alleged were taken away from him as part of a "conspiracy to drive [him] from his employment by Nationwide and to prevent him from engaging in the commercial trade paper business and to deprive him of the benefits of its Pension Plan . . ." (69a). According to the state court complaint, the conspiracy was effectuated by two means: (1) inducing Herendeen "to relinquish and give up all his commercial paper accounts and to forego the commissions thereon upon the representation by defendants that [Herendeen] would receive a written contract of employment" (68a); and (2) causing "the Trustees of said Plans to refuse benefits to the plaintiff . . . said refusal [being] wrongful, illogical and without cause" (69a).

The federal case is based on the identical alleged conspiracy to force Herendeen out of the paper industry, but the means alleged to have been employed to carry out the conspiracy have been halved. In the federal court, Heren-

deen has excised all references to the alleged promise of an employment contract and has rested his entire case on the allegedly wrongful denial of his pension. In the amended federal complaint, Champion and Nationwide, along with the trustees of the Plan and the Committee, which administers the Plan, are alleged to have engaged in the same conspiracy "wrongfully and in violation of the terms and conditions of the Plan, to force plaintiff out of the paper industry and to withhold from him and thereby retain within the assets held by the Trustees, the monies and benefits to which plaintiff is entitled" (92a). The amount of damages claimed has of course not suffered by the reduction of the scope of the alleged conspiracy. Indeed, Herendeen's alleged damages as a result of the termination of his pension benefits have ballooned from $75,000 to some $885,000 in compensatory and punitive damages.

Each issue raised in the amended federal complaint was therefore raised by and could have been litigated under the state court complaint's conspiracy allegations. "All theories upon which relief can be sought should be presented in a single proceeding, otherwise the doctrine of finality and res judicata would be meaningless. A party cannot 'escape the effect of the adverse determination by clothing the claim in different garb.'" *In re Orbitec Corp.*, 392 F. Supp. 633, 636 (S.D.N.Y. 1975) (footnote omitted) (Weinfeld, J.). *A fortiori* in our case where in the federal court the claim is clothed in the very same garb of conspiracy to drive Herendeen from the paper industry and to deprive him of his pension benefits.

Identity of Parties

The court below concluded from its examination of the Plan that "all the defendants here, other than Champion and Nationwide, are agents of Champion and Nationwide

and therefore in privity with them" (129a). It hardly becomes Herendeen to challenge this conclusion in view of the allegations in his own amended federal complaint that Champion "is in complete control of all of the defendants herein and its subsidiaries with respect to the actions alleged to have been taken by such defendants and subsidiaries with respect to plaintiff as set forth herein" (92a) and that "all of the defendants have wilfully acted in concert" (92a) "under the aegis of Champion" (95a). We need go no further than Herendeen's own pleading to establish the privity of Champion and Nationwide with the other defendants.

Conclusion

The identity of issues and of parties appearing on the face of Herendeen's own pleadings, the application of *res judicata* is inexorable. A judgment on the merits having been entered in the state court, *Glick* v. *Ballentine Produce, Inc.*, 397 F.2d 590, 593 (8th Cir. 1968); *Warren* v. *Lawler*, 343 F.2d 351, 357 (9th Cir. 1965)*, this subsequent suit involving the same parties and the same claims is barred. *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322 (1955). The judgment of the state court put Herendeen's claim to rest, and it cannot be brought into litigation again by Herendeen against Champion and its privies no matter what pleading refinements Herendeen's able counsel may devise to make it appear to be a "different" cause of action. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).

POINT IV

In any event, the second Count of the amended complaint fails to state a claim for punitive damages.

Repeating and realleging the allegations of his first Count, Herendeen purports to set forth in his second Count

* At page 10 of his brief, Herendeen himself concedes that the dismissal in the state court was on substantive grounds.

a claim for punitive damages in varying amounts from the several defendants. Herendeen's purported claim for punitive damages is of course in the teeth of the express provisions of the Plan, which, as we have demonstrated in Point I (*supra* at pp. 13-16), bar any claim for monetary damages against any of the defendants. This bar applies to all monetary damages, whether compensatory or punitive.

But, even without recourse to the Plan, Herendeen's claim for punitive damages, as set forth in his second Count, would still have to be dismissed as a matter of law:

The controlling Second Circuit precedent of *Koufakis* v. *Carvel*, 425 F.2d 892 (1970)

As we have noted in Point I, *supra* at pp. 12-13, Herendeen's claim under the Plan is essentially one for breach of contract. *Gitelson* v. *Du Pont*, 17 N.Y.2d 46, 48-49, 268 N.Y.S.2d 11, 13 (1966); *Menke* v. *Thompson*, 140 F.2d 786, 790 (8th Cir 1944); *Vocke* v. *Third Nat. Bank & Trust Co.*, 28 Ohio Misc. 58, 267 N.E.2d 606 (Mun. Ct. 1971). In such a case, this Court has flatly held that punitive damages are not available under any circumstances. The controlling and dispositive case on this point is *Koufakis* v. *Carvel*, 425 F.2d 892 (2d Cir. 1970), in which the Court held:

> "A second rationale for our holding on this question is simply that the New York courts would not allow punitive damages in a case where the claim advanced is essentially one of breach of contract. A breach is a breach; it is of marginal relevance what motivations led to it" (425 F.2d at 906).

The controlling New York authorities

In *Koufakis*, this Court reviewed the New York authorities as to the availability of punitive damages. It con-

cluded that under New York law the right to punitive damages is limited to grossly wanton acts of high moral culpability, aimed at the public generally, in which punitive damages are necessary to induce suit to right wrongs which would otherwise go unpunished. *Vinlis Construction Co.* v. *Roreck*, 27 N.Y.2d 687, 314 N.Y.S.2d 8 (1970); *Huschle* v. *Battelle*, 33 App. Div. 2d 1017, 308 N.Y.S. 2d 235 (1st Dep't 1970), *aff'd*, 31 N.Y.2d 767, 338 N.Y.S.2d 622 (1972); *American Electronics, Inc.* v. *Neptune Meter Co.*, 30 App. Div. 2d 117, 290 N.Y.S.2d 333 (1st Dep't 1968).

The leading cases on this point are *Walker* v. *Sheldon*, 10 N.Y.2d 401, 223 N.Y.S.2d 488 (1961), and *James* v. *Powell*, 19 N.Y.2d 249, 279 N.Y.S.2d 10 (1967).

In *Walker*, the New York Court of Appeals, over a vigorous dissent by Judge Van Voorhis, who maintained that the firmly established rule in New York is that punitive damages are not available even in fraud cases, carefully limited the availibility of punitive damages to the most egregious and wanton examples of moral turpitude. The court held:

> "[W]e are persuaded that, on the basis of analogy, reason and principle, there may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involves high moral culpability. And this court has—in line with what appears to be the weight of authority (see, e.g., *Bell* v. *Preferred Life Soc.*, 320 U.S. 238; *Day* v. *Woodworth*, 13 How. [54 U.S.] 363, 371; *Greene* v. *Keithley*, 86 F.2d 238, 241; *Laughlin* v. *Hopkinson*, 292 Ill. 80; *Whitehead* v. *Allen*, 63 N.M. 63; *Saberton* v. *Greenwald*, 146 Ohio St. 414; *Craig* v. *Spitzer Motors*, 109 Ohio App. 376; Ann., 165 A. L. R. 614)—sanctioned an award of such damages in a fraud and deceit case where the

> defendant's conduct evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations" (10 N.Y.2d at 405, 223 N.Y.S.2d at 491).

In *James* v. *Powell*, *supra*, the New York Court of Appeals harkened back to the standards it had enunciated in the *Walker* case and held:

> "In short, the defendant Powell may have committed a wrongful act but his conduct was not so 'gross and wanton' as to bring it within the class of malfeasances for which punitive damages may be awarded" (19 N.Y.2d at 260, 279 N.Y.S.2d at 18-19).

In our case, the *Walker* and *James* standards for the award of punitive damages have not even been approached. The alleged acts complained of were not grossly wanton, did not involve high moral culpability and certainly did not approach "criminal indifference to civil obligations." Nor were the acts complained of aimed at the public generally, but rather at Herendeen individually. Also, punitive damages are clearly not necessary to induce Herendeen, now in his second forum engaged in his second litigation against Champion, to bring suit.

But the most significant distinction is that this is not an action for fraud and deceit like *Walker* and *James*, but rather a suit for breach of contract, where the principle of *Koufakis* v. *Carvel*, 425 F.2d 892 (2d Cir. 1970), that punitive damages are not available in contract cases under any circumstances, governs.

And if more were needed to dispose of Herendeen's unfounded claim for punitive damages, there is a recent holding by the Appellate Division, First Department, in *English* v. *U. S. Plywood-Champion Papers, Inc.*, 43 App. Div. 2d 538, 349 N.Y.S.2d 686 (1st Dep't 1973), which is pre-

cisely applicable to our case. English, like Herendeen, is a former employee of Champion who resigned and went to work for a competitor of Champion. When the Committee sought to enforce the provisions of section 15.8 of the Plan, English commenced a suit in the Supreme Court of the State of New York, County of New York, seeking, *inter alia*, $1 million in punitive damages, arguing that Champion was engaged in a scheme "calculated and intended by the defendant to prevent the plaintiff from engaging in the only occupation in which he has been engaged during most of his adult life."

In directing the dismissal of English's punitive damages claim, the Appellate Division held:

> "With reference to the claim for punitive damages, there is complete absence of any factual basis justifying such claim" (43 App. Div. 2d at 538, 349 N.Y.S.2d at 687).

As a matter of law, therefore, Herendeen may not recover punitive damages from any of the defendants by reason of the facts set forth in the amended complaint. Accordingly, the second Count of the amended complaint must, in any event, be dismissed for failure to state a claim for punitive damages upon which relief can be granted.

CONCLUSION

The judgment and order appealed from should be, in all respects, affirmed.

Dated: New York, New York
July 18, 1975

Respectfully submitted,

KRONISH, LIEB, SHAINSWIT, WEINER & HELLMAN
Attorneys for Defendants-Appellees
1345 Avenue of the Americas
New York, New York 10019
Tel: (212 765-6000)

Of Counsel:
SEYMOUR SHAINSWIT
MARTIN TEICHER

UNITED STATES COURT OF APPEALS
For The Second Circuit

Docket No. 75-7033

JAMES W. HERENDEEN,

Plaintiff-Appellant,

against

CHAMPION INTERNATIONAL CORPORATION: NATION-WIDE PAPERS INCORPORATED; and CHEMICAL BANK NEW YORK TRUST COMPANY; THE FIFTH THIRD BANK, and the COMMITTEE, as Administrator of the Retirement Plan for Salaried Employees of Certain Subsidiaries of CHAMPION INTERNATIONAL CORPORATION,

Defendants-Appellees.

On Appeal From The United States District Court For the Southern District of New York

---

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

LOUIS MARK, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 25th day of July 1975 he served three copies of the attached Defendants-Appelles' Brief in the above entitled action on Gilbert J. Stroming, II, Attorney for Plaintiff-Appellant, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing same in The United States Post Office maintained at No. 150 Christopher Street, New York City, New York.

Gilbert J. Stroming, II, Esq.
118 Washington Street
Morristown, New Jersey 07960

Louis Mark

Louis Mark

Sworn to before me this

25th day of July 1975

Quinton C. Van Wynen

QUINTON C. VAN WYNEN
Notary Public, State of New York
No. 24-4037465
Qualified in Kings County
Commission Expires March 30, 1977